IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO.26 OF 2007

MR. GOPAL NADKARNI .... Petitioner/accused.

Versus

1. Mrs. Vidhya D'Silva .... Respondent no.1/accused.

2. State of Goa through P.P., Margao. .... Respondent no.2.

Mr. V.A. Lawande, Advocate for the Applicant.

Mr. A. Viegas, Advocate for the Respondent no.1.

CORAM: N.A. BRITTO, J

DATE:5th JULY 2007.

P. C.

1. Heard learned Counsel on behalf of the parties.

2. This revision is filed by the accused against order dated 8.11.2006 of the learned Additional Sessions Judge, Margao by which the conviction and sentence imposed upon the accused under section 138 of Negotiable Instrument Act, 1881, has been upheld.

3. The case of the complainant is that the accused having borrowed from the complainant a sum of Rs.3 lacs the accused gave to the complainant three cheques in the sum of Rs.2.25 lacs towards repayment of said loan. The case from which this revision arises pertains to these three cheques in a total sum of Rs.2.25 lacs. Another case in respect of a cheque for Rs.75,000/- is pending before the learned J.M.F.C., Margao.

4. The complainant had examined herself in support of the complaint and had produced the relevant documents. The accused did not enter into the witness box but examined one Ankush Naik as his witness in support of his case that the statutory notice dated 7.10.2003 sent by the complainant could not have been received by the accused, as the shop of the accused, where it was sent, was closed.

5. At the hearing of this revision petition, two points have been raised on behalf of the accused.

6. The first is regarding non service of the notice.

7. Learned Counsel on behalf of the accused submits that the shop of the accused where the statutory notice was sent by the complainant was closed for a period of about 10 days from 5.10.2003 and therefore the same could not have been received by the accused, as stated by the said witness of the accused namely Ankush Naik. Learned Counsel further submits that the accused had also produced blood analysis report dated 5.10.2003 to prove that he was unwell and therefore was not at the shop to receive the said notice. The contention of the learned Counsel is that in such a situation it was for the complainant to have examined the Postman to prove the fact that the notice was in fact served upon the accused. Learned Counsel has placed reliance on **M/s Dalmia Cement (Bharat)Ltd. v. M/s Galaxy Traders and Agencies Ltd. and others [2001(1) ALL MR 846]** and two decisions of this Court in **Parvatibai Maruti Hande v. Satish Mohanram Prajapati [2001**

Vol.103(4) Bom.L.R. 516] and **Lalmani Ramnath Tiwari v. Bhimrao Govind Pawar [2001(2) ALL MR 415]**. As far as these two decisions of this Court are concerned, they can be immediately distinguished. The tenants against whom the presumption of service was sought to be raised, had stepped into witness box and had given evidence stating that they had not received the notice purported to have been sent by the Landlord.

8. As far as the decision in M/s. Dalmia Cement (Bharat) Ltd. (Supra) is concerned, the Apex Court has stated that section 27 of the General Clauses Act deals with the presumption of service of a letter sent by post. The despatcher of a notice has, therefore, a right to insist upon and claim the benefits of such a presumption. But as the presumption is rebuttable one, he has two options before him. One is to concede to the stand of the sendee that as a matter of fact he did not receive the notice, and the other is to contest the sendee's stand and take the risk for proving that he in fact received the notice. It is open to the despatcher to adopt either of the options. If he opts the former, he can afford to take appropriate steps for the effective service of notice upon the addressee.

9. Both the Courts below have disbelieved the version given by DW1/Ankush Naik. The reasons for discarding his evidence can be found in para 8 of the judgment of the Trial Court and in para 19 of the judgment of the Appellate Court. There is no explanation from the accused as to why he himself did not step into the witness box in support of his claim that he had not received the said notice. The presumption available in favour of the complainant by virtue of section 27 of the General Clauses Act was certainly

not rebutted in this case by the accused by his bare statement in his examination under section 313 of the Code or by the production of the blood analysis report dated 5.10.2003. On the facts of this case, the presumption was clearly available to the complainant. The learned First Appellate Court relied upon the case of **V. Raja Kumari v. P. Subbarama Naidu (2004 AIR SCW 6344)** wherein it was stated that once the notice is dispatched by the sender by post with correct address on it, it is deemed to be served on sendee unless he proves that it was not really served. The learned First Appellate Court had noted that the envelope mentions on it that the addressee was intimated on 8.10.2003 and the notice was returned as unclaimed. Considering the facts, this was a case where the presumption was clearly available to the complainant which the accused had failed to rebutt particularly by leading the best evidence i.e. his own. The findings on this aspect on both the Courts below could not be faulted. There is no perversity in the said findings. Once the complainant sends a prepaid registered letter by post with the sendee's correct address, he has no control over it and it is presumed to have been delivered under section 27 of General Clauses Act.

10. Next, the learned Counsel contends that the accused had also rebutted the presumption available to the complainant in terms of section 138 and 139 of Negotiable Instrument Act, 1881. In this contest, learned Counsel has pointed out certain discrepancy in the evidence of the complainant. For example the complainant at one stage had stated that a sum of Rs.3 lacs was given to the accused in one lump sum, but at another stage the complainant had stated that initially Rs.2 lacs was give and later Rs.1 lac. Learned

Counsel also contends that all that the accused had taken from the complainant is a sum of Rs.2 lacs regarding which the accused had given to the complainant a pronote of Rs.2 lacs. Although suggestions in this regard were put to the complainant, from the cross examination it is clear that the complainant has refused to accept that the accused had given to her a pronote of Rs.2 lacs for the sum of Rs.2 lacs advanced by her. In fact the pronote for Rs.2 lacs was shown to the complainant in the cross examination, but she has categorically stated that she had given Rs.3 lacs to the accused somewhere in mid January 2003 and thereafter she had asked the accused to return the said money but when he came with the pronote of Rs.2 lacs, she did not take it and told the accused either to give a promissory note of Rs.3 lacs or to pay the entire amount in cash, and it is for this reason that the said pronote of Rs.2 lacs remained with the accused.

11. Both the Courts below have accepted the evidence of the complainant that towards the loan of Rs.3 lacs i.e. the subject cheques in the sum of Rs.2.25 lacs were given by the accused. This is a case where the presumptions both under section 138 as well as 139 of the Negotiable Instrument Act, 1881 were available to the complainant and which presumptions the accused had failed to rebut.

13. Considering the above, I find there is no merit in this petition, consequently the same is hereby dismissed.

N. A. BRITTO, J.

ef